No. 2736

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

TACOMA RAILWAY & POWER CO.,
a Corporation,
Plaintiff in Error,

vs.

WILLIAM COTHARY AND MARGARET COTHARY, husband and wife,
Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

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EXHIBIT "B"

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STATEMENT OF THE CASE

The injuries to the plaintiff, Mrs. Cothary, occurred in the Point Defiance Park in the City of Tacoma on the 20th day of July, 1913, through the

negligence of the Tacoma Railway & Power Company. The street car company does not own the ground and is simply given a franchise or license to operate its street car into the park the same as upon a public street. This license was given by Ordinance No. 2389 of the City of Tacoma, the material part of which is as follows:

> "Sec. 1. That there be and is hereby granted to the Tacoma Railway & Power Company, its successors and assigns, the *license, right and privilege* to construct, operate and maintain a line of double track, electric street railway, together with the necessary poles and wires for electric purposes within Point Defiance Park subject to the rights of the government of the United States in and to said premises; the rights and privileges herein granted to said Tacoma Railway & Power Company, being as hereinafter set forth and none other.
>
> Sec. 3. At the terminus or loop of said railway and for a distance along the main line, to be agreed upon by said Railway Company and the Board of Park Commissioners, the said Railway Company shall construct and maintain a wire fence six feet high, with suitable gates and turnstiles for the protection of the public in getting on or off the cars."

The street car company erected the platform and

the turnstile shown in the cut (exhibit B) which permits people to go through from the park into the bath house seen in the cut just beyond the turnstile. There were no restrictions on the people traveling anywhere along the line of the street car company or using the tracks for any purpose and during July and August more people visit the part than at any other time, 400 to 500 people visit the bath house of an evening. (Rec. 40.) They used the way along which the track ran as a public street. (Rec. 41.) The people over in the main part of the park, wishing to go to the bath house, go down the path which extends along the fence until they reach the embankment where the grade or cut is made for the street car tracks, along the street car tracks to the turnstile, through the turnstile into the bath house. This was the course taken by the defendant in error, Mrs. Cothary, and her friends, Mr. and Mrs. Helander, when they took her to the bath house to see the sights. When they reached the platform shown in the cut, they walked on to the turnstile expecting to go through as the Helanders had repeatedly done so. Mr. Helander led the way, went to go through the right hand side of the turnstile when it caught and would not turn and Mrs. Helander was next, she passed around to the left hand

side of the turnstile and jiggled it a little when Mrs. Cothary stepped in front of the turnstile and tried to assist to turn it. As they were doing this a street car of the plaintiff in error came down the incline without ringing any bell or sounding any alarm and struck Mrs. Cothary on the right side, hip, shoulder and on the inside of the left knee, the left leg extending out further from the body, producing the injuries. None of the three at the turnstile heard the car and the car did not whistle until at the immediate time of the collision. They did not intend to stop there. Mrs. Cothary had been raised near railroad tracks and certainly had been trained to pay some attention to the approach of trains. (Rec. 23.)

Mrs. Cothary:

> "I could not tell how close to the track I was. I was trying to get through there and trying to turn that around, I supposed it was a safe place to be and supposed I could hear a car coming but I didn't. Yes, I was paying attention, I was going to go right through the gate; when we found the gate would not revolve that way we were all trying to work it loose when I got hurt." (Rec. 23.)

> "I looked back to see whether a street car was near or not or coming as I stepped on the

platform, I turned round and looked up the track. I was there for just a short time, I was expecting to go right through the gate and did not look back again. I didn't know I could not get through the gate * * * I didn't pay any attention to the distance that my body was from the railroad track as I stood there because I expected to go through the gate. I was there a very short time. We were not pushing very long when it occurred. I didn't see the street car or hear it until it struck me. I heard two toots just as it struck me." (Rec. 25.)

"I didn't attempt to ascertain whether or not a street car was coming from the time I looked back, I didn't think a street car could be there. We were just going right through." (Rec. 26.)

The end of the spindle was projecting towards the track and is four feet away from the track. The car extended over the rail towards the turnstile 18 inches. Mrs. Cothary stood at the end of the spindle towards the track as shown in the cut.

Oscar Helander:

"I was leading and when I came to the gate it stuck. My wife came right behind and she went to the other side of the gate and said, 'Let us try it the other way,' and then Mrs. Cothary got between us, in front of the turnstile; so we got it a quarter of the way around, that was all we could do. We

could not get in from there; it was impossible to get it open enough to go through and the moment we got together there the car came. I heard a whistle and the same moment it struck her and I should judge it took about a second for the car to pass and there was a cloud of dust following the car so I couldn't see where she landed. * * * After we had reached the platform we didn't look to see whether there was a car coming; we proceeded right ahead some distance before we struck the platform we looked. I thought it was perfectly safe there, and went the first thing to the gate. We were not expecting to stop on the platform at all." (Rec. 29-30.) I didn't find out what was the matter with the turnstile when I was there but afterwards. * * * I think it was about a week after the accident I found one spoke of the turnstile was working almost against the other or dropped down, or the whole turnstile had sunk down rather, and that was the cause of the turnstile not going clear around. (Rec. 31-32.)

"There was no other whistle blown except those two that I heard at the time of the accident. I have had experience in railroading, I was fireman for 10 years and I can tell about the rate of speed a car is going when it passes me. That car was going from 30 to 35 miles per hour." (Rec. 35.)

Paul Jackson:

"I was the motorman in charge of the car

that struck Mrs. Cothary. Then as I was coming out of the first curve I noticed some people standing on the platform at the bath house. They didn't look to be in any danger from where I was. The car went down with a slight application of air to set the brakes, but when I got within a car length or two of the platform, I noticed that one lady was in danger. * * * (Rec. 46.)

"When I came down the line and reached 54th street I stopped. It is a regular stop and then got a bell to go on, which is necessary to go ahead. It is down hill to the platform, but the grade is not quite so steep when we start at 54th street as it is just before we reach the platform. We start the car with the juice and then when the car gets headway, throw off the juice and let it roll down. It will roll on down clear to the park without any further juice and that is the way I did on this day. I threw off the juice as I was going out of the first curve, that is the curve just inside of the park from 54th street. When I came down the line and reached 54th street I stopped. Here exhibit "E" is marked with figure 1 in circle. Then the curve goes on down to the point which is marked on the exhibit figure 2 in the circle with red lead pencil. When you get out of the curve that is at figure 2 then strike a tangent, I couldn't say as to the distance between the two, but it is several hundred feet to the point marked figure 3 in the circle,

which is another little curve; it is about the same as the others was, and as you reach the second curve the grade is a little bit steeper, and then you reach the end of the curve at figure 4 marked in red lead pencil in the circle. Then it is a tangent down to the platform. The grade then commences about a car length or two from the other side of the platform, which would be about the switch. At the point marked with a caret in red lead pencil, then there is an up-grade in the loop. I first saw the people on the platform as I was coming out of the first curve. To the best of my recollection the man and one lady were standing in close to the stile and the other lady was standing out closer to the track when I first saw them. It looked like they were standing there in conversation at the stile, right opposite the stile, to the best of my recollection from the time I first seen them until the car struck her. I don't remember that they were standing there as seen in exhibit "B." They may have moved but I never noticed them. It is my duty to look ahead and see where there is any danger on the track or people near the track, that is part of my duty as a motorman, and when I came out of the first curve I looked down to see if my way was clear and I let my car roll on down hill. And then when I came out of the second curve I saw that Mrs. Cothary was in danger." (Rec. 47-48.)

Of course he then went on to state that he blew

the whistle and did everything he could to stop the car, but the jury could not have believed him in that regard, and his testimony on cross-examination in the record at pages 49 to 61 inclusive warrants the jury in not believing his testimony. At this trial Jackson stated that after striking Mrs. Cothary his car stopped two lengths beyond, that is, his car ran two lengths of itself, 90 or 100 feet, when it stopped. At the former trial he testified that the rear of his car was two lengths away from the turnstile, making the car run three lengths or about 150 feet after the collision. (Rec. 49-50 and 76-80 inc.)

ARGUMENT

Boiled down, we have two licensees in the public park of Tacoma, one a street car running on a fixed track, and the other a pedestrian: the one running on the track has the right of way while using the track and the pedestrian must give way because the street car cannot turn from the track; their rights are reciprocal the same as on a public highway. Then we have the pedestrians leaving the track, getting from the space that must be occupied by the street car and not intending to again get near the

track and but for the turnstile sticking and refusing to turn and let them through to the bath house, they would have kept on their way leaving the track behind. But the turnstile stuck. They were held on the platform and for a moment tried, as a matter of course, to turn the turnstile the other way in their efforts to get through, and while occupied in their efforts to get through, the street car came down the hill 30 to 35 miles an hour, without warning and unknown to them, striking Mrs. Cothary and injuring her for life. The motorman saw them at the turnstile a long way off and as he entered the tangent that led to the platform saw Mrs. Cothary in a place of danger and did nothing to avert the accident.

Did Mrs. Cothary and the Helanders use ordinary care at that time was a question for the jury to decide. Did the motorman running his street car use ordinary care, either in running his car at that high rate of speed, in failing to warn them of the danger or in failing to stop his car were also questions for the jury to decide. The jury answered these questions in favor of Mrs. Cothary after a fair trial and the law fully and correctly given them. I might say by way of parenthesis that the

argument set forth in brief of plaintiff in error is the first and only argument it has made in support of its motion for directed verdict.

Under the evidence in this case the circumstances surrounding Mrs. Cothary were such that there could not have been any fixed standard of duty and there was no duty defined by law upon which a directed verdict could be based.

The facts as to what she should have done were not such as to conclude but one reasonable inference necessary upon which a directed verdict should have been granted.

> "There are two classes of cases in which the question of negligence may be determined by the court as a conclusion of law * * *. The first is where the circumstances of the cases are such that the standard of duty is fixed and the measure of duty defined by law and is the same under all circumstances * *. And the second is where the facts are undisputed and but one reasonable inference can be drawn from them."

MacQuillan vs. Seattle, 10 Wash. 464;

Budman vs. Seattle Elec. Co., 61 Wash 281.

Budman was shoveling gravel on a street car track. All other cars passing him had

rung the bell notifying him of their approach but the one that struck him did not. A verdict for the plaintiff was set aside and judgment notwithstanding the verdict entered against him. The case was reversed by the Supreme Court with instructions to enter judgment on the verdict.

In commenting upon the case of *May vs. Seattle Elec. Co.*, 47 Wash. 497, cited and relied on by plaintiff in error in this case, the court said:

> "We hardly see how the doctrine announced in this case, where the cars had no notification of the presence of a pedestrian on their tracks, where there was no duty owing to the pedestrian excepting to travel within the time prescribed by the law, to keep the ordinary lookout and to protect the pedestrian after he was discovered upon the track if possible, but where the duty was upon the pedestrian to keep off of the track at the place where he was injured and where he had an opportunity to keep off of it and still pursue his journey, can have any application to the facts of this case."

The same comment can be made in this case as Mrs. Cothary was not walking along the tracks but was at a place where she expected to go away from the track before and at the time of being struck. This Honorable Court has recognized the rule quoted above in several street car cases but under circum-

stances stronger against the injured person than circumstances in this case.

Hays vs Tacoma Ry. & Power Co. 106 Fed. 48;

Tacoma Ry. & Power Co. vs. Hays, 110 Fed. 496.

In this latter case the court said:

"The question of negligence is generally one of fact for the jury. It is only where the facts and the inferences to be drawn therefrom are such that all reasonable minds must reach the same conclusion that the question is ever considered one of law for the court. There is no fixed standard in the law by which a court is enabled to say arbitrarily in every case where the line must be drawn between negligence and ordinary care. What may be deemed ordinary care in one case may, under different circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether

there was negligence or not, the determination of the matter is for the jury."

Seattle Elec. Co. vs Hovden, 190 Fed. 7.

Plaintiff crossing two railroad tracks looked about 400 feet distant and saw a car. She then passed behind a stationary car when she was struck by the car she had seen 400 feet away and was injured.

"A pedestrian in crossing a street railway track is not bound to take such precautions as are demanded by one who crosses a railroad track, hence a trespasser on the right of way of a street car company is not bound by any strict rule of law as when he approaches a steam railroad crossing to stop, look and listen or to take special precautions to determine whether there is danger in going upon the track."

The same rule was applied by this Honorable Court in *Tacoma Ry. & Power Co. vs. Remmen*, 220 Fed. 617.

The rule announced in this case, which is the generally accepted rule in street car cases, is to the effect that when one is crossing a street car track going into a place of possible danger, he must observe and use ordinary care. If he has done that, he has fulfilled the law governing his conduct.

Had Mrs. Cothary been struck by a car while

crossing the tracks to the platform under circumstances described in these cases, even then the question of contributory negligence on her part would be for the jury to decide. But she had crossed the track, she had gone beyond the point of danger. She had reached the platform made and provided for people when she looked and saw no car and thinking no more about danger because she was out of danger, she proceeded down to the turnstile to go into the bath house when her way was obstructed by the defective turnstile. Her attention was on the efforts of the three in trying to pass through the turnstile when the accident happened. There certainly can be no fixed rule as to her conduct at that turnstile. Should she have looked again before going to the end of the spokes to help turn the stile is a debatable question. She was not going into any place of known danger. She was not expecting a car and her mind was upon the turning of the turnstile which she thought, and which all of them had a right to think, would check and hold them there only for a moment and then they would go on through. They were trying to discover why the turnstile stuck. It stuck and while attempting to make it go the accident occurred.

Now the plaintiff in error has cited a long list

of cases, none of which are in point. Before taking up the cases cited I wish to refer to the charge that Mrs. Cothary was a licensee. The evidence does not bear out that fact. She had as much right on that platform as the street car had in operating its line into the park; but in fact it is immaterial in this case whether she was a licensee or not for the motorman saw the parties at the stile long before he reached the tangent and when he reached the tangent, a distance of about 150 feet away from Mrs. Cothary, he knew she was in danger and did nothing, under our evidence, to warn her as was his duty to do. And the jury so found.

The cases cited by plaintiff in error need only to be glanced at to see that they are not in point.

The N. P. Ry. Co. vs. Jones, 144 Fed. 47.

> Jones was walking on the railroad track up a canyon where the noise of rushing water was such that he could not hear the train that struck him. He was in a place of danger.
>
> "The plaintiff voluntarily placed himself in a place of danger from which he has present means of escape and continued there without exercising precautions which an ordinary prudent man would exercise. We have nothing here to do with the law appli-

cable to the case where the injured person is found in a place of danger, as upon a railroad trestle from which he is powerless to extricate himself upon the approach of a train and where his situation is discovered or should have been discovered by those in charge of the train."

Ry. vs. Cook, 66 Fed. 115.

A trespasser in railroad yards injured by the ordinary switching of cars.

Felton vs. Aubrey, 74 Fed. 350.

An infant trespassing on the tracks. Railroad not liable unless after the discovery of his presence on the track, it has failed to use ordinary care to avoid injury.

Gardner vs. Trumball, 94 Fed. 321.

Child two years of age strayed upon the track and was killed by a passing train. Non-suit granted, reversed and held as a matter of law that the parents were not guilty of contributory negligence, but the question was one for the jury.

Ry. vs. McClish, 115 Fed. 268.

McClish was killed while walking along the tracks between two trains.

King vs. Ry., 114 Fed. 855.

King was run over in railroad yards while the company was switching cars.

Ry. vs. Mosley, 57 Fed. 921.

Plaintiff was injured in railway yards. Statute forbids strangers from walking in yards on railroad tracks. He stepped from one track to avoid a train, walked 300 feet on the next track and was struck by an engine.

Hart vs. N. P., 196 Fed. 180.

Hart, a drover, went to talk with the conductor of his train in the railway yards and did not watch out for trains and was struck.

Morgan vs. N. P., 196 Fed. 449.

Morgan on a very dark and windy night went upon the railroad bed between the tracks and then went upon the middle of one of the tracks and was struck by a train.

Kaiser vs. N. P., 203 Fed. 933.

Kaiser with a companion was walking through the railroad yards, saw an engine approach, coming at 6 or 8 miles an hour and then crossed over two or three tracks and the engine crossed over and struck him.

Garlich vs. N. P., 131 Fed. 837.

Garlich without any occasion was walking between the tracks, saw an engine, went over to a track and walked 150 feet and was struck before he looked again.

Ry. vs. Summers, 173 Fed. 358.

Railroad crossing case. Verdict below

for the plaintiff and case reversed on the grounds of improper instructions.

Gannoway vs. St. Ry., 77 Wash. 655.

Plaintiff had alighted from a street car upon a platform which was erected at a point where the car turned the corner of the street to pass at right angles. He did not notice the overhanging of the car when it rounded the curve which struck him. The conductor claimed he did not see the persons as they were walking too close to the track on the platform as it was dark, and the court said:

"Of course if he actually saw or discovered that they were in a perilous position in time to prevent an injury, by waiting until they had left the platform or by stopping the car after he had been directed to start, a different question would be presented but nothing of this kind appears in the record."

Meys vs. St. Ry. Co., 47 Wash. 497.

Meys went along over the tracks of the street car and did not look or observe. They held that he should have paid some attention to the dangerous position he was in.

Kiely vs. St. Ry. Co., 78 Wash. 396.

A street worker engaged in cleaning sewers struck by a street car. Repeated gongs upon the car were sounded for a distance of 75 or 200 feet. He paid no attention to it.

State vs. St. Ry. Co., 68 Atl. 197.

Party injured was riding in a wagon until he got about opposite his home. Wagon stopped and he got out on the hub, stood there and talked with the driver and then he stepped down off of the wagon close to the street car track. Nothing to draw his attention from the on-coming street car. He went towards the street car track into a place of danger without any occasion for it except his own convenience and was expecting to cross the track.

Bailey vs. St. Ry., 42 Pac. 914.

An old lady standing between a couple of tracks. The car came along which she wanted to take; she stepped back on to the other track in front of a car only 10 feet away and was struck.

Hafner vs. St. Ry., 75 N. W. 1048.

Hafner was at work on a street placing a plank alongside a street railway track. He did not notice the car which was coming and stooped over suddenly to turn the plank and was struck by the car.

"The evidence discloses no reason for his failure to so look. There was nothing to distrack his attention. He knew the cars passed the place frequently, he was not frightened, bewildered or misled and the slightest care on his part for his own safety would have prevented his injury." The motorman saw

the plaintiff 20 feet away when he was standing beside the track and the plaintiff suddenly stooped over and was struck.

Jager vs. St. Ry. 32 New York Supp. 304.

Jager was walking on a track, saw a car coming and did not get out of the road. Collision.

Ry. vs. Schwindt, 72 Pac. 573.

Schwindt was walking on a street car track where there was no occasion for it and was struck by a car without looking.

St. Ry. vs. Besse, 108 S. W. 848.

Besse was driving with a wagon around a curve of a street car track and so near that the swing of the car in turning the curve struck his wagon and threw him against the brake and injured him. No occasion for driving so close to the track at the curve.

Bryant vs. St. Ry., 98 N. E. 587.

Bryant was walking on a sidewalk at a point of a sharp curve. A vehicle was being driven close to the track at the curve and was struck by the overhang of the street car as it rounded the curve. Held driver and street car company both liable.

Garvey vs. St. Ry. Co., 58 Ata. 456.

Garvey stood at a curve waiting for a car. Car came along, swung around the

curve and struck him. He stood too close to the track while waiting for his car.

Hayden vs. St. Ry., 56 Ata. 613.

Hayden was hit by a car running around a curve. Case submitted to the jury, which returned its verdict for defendant.

Widmer vs. St. Ry., 32 N. E. 899.

Plaintiff was standing near the track at a curve waiting for her car. She saw the car come. She was looking north at some teams while the car was coming from the south and saw the car go by her and thought she was far enough from the track, but was struck by the handle on the rear dasher of the car as it went around the curve.

Woods vs. St. Ry., 120 N. W. 121.

Woods was standing waiting for a car, saw the car coming, but stood too close and was hurt on a straight track.

Townsend vs. St. Ry., 154 S. W. 692.

Townsend was waiting for a car at a curve, saw the car coming, got too close to the track and was hit by the overhang of the fender.

Smith vs. Ry. 128 S. W. 1177.

Smith was at a flag station of the railway. Stepped on to the track to flag the train by a lighted match held in his hand. Saw the train coming but didn't get out of

the way and was struck.

Again we submit that there is no case cited by plaintiff in error applicable to this case. Or, perhaps, to be more charitable, the majority are absolutely not in point and the small minority are easily distinguishable.

ASSIGNMENT NO. 2

Oscar Helander, one of the party at the turnstile, who testified about the turnstile sticking and refusing to turn and let them through, further testified that about a week afterwards he went to the turnstile to see why it stuck and did not let them through and said:

> "I found one spoke of the turnstile was working almost against the other or got down or the whole turnstile had sunk rather and that was the cause of the turnstile not going clear around."

The cases cited by plaintiff in error are not similar to this case. Here was a condition at the time of the accident. The turnstile was constructed and maintained by the plaintiff in error. About a week

after the accident, the witness went to see the cause of the turnstile sticking and found it. The fact that the turnstile on August first, which was after Helander looked at it, was in good condition only showed that it had been repaired after Helander saw it. He is not disputed as to the conditions he found at the time of the accident and at the time of his inspection. It was in the power of the street railway who constructed and maintained the turnstile to know all about the conditions, so the rightful conclusion is that the condition which caused the turnstile to stick remained the same from the time of the accident to the time Helander inspected it.

Wigmore, discussing this subject, Vol. I, Sec. 437, of his work on Evidence, says:

> "That no fixed rule can be prescribed as to the time, or the conditions, within which a prior or subsequent existence is evidential is sufficiently illustrated by the precedents from which it is impossible (and rightly so) to draw a general rule. They may be roughly grouped into two classes—those in which the evidence has been received without any preliminary showing as to the influential circumstances remaining the same in the interval (thus leaving it to the opponent to prove their change by way of explanation in rebuttal), and those in which a preliminary showing is required. Whether it should be

required must depend entirely on the case in hand, and it is useless to look to or wish for any detailed rules. * * *

See also *Ry. Co. vs. Brown*, 71 Ata. 1005.

Brooks vs. Winters, 39 Md. 509.

6th Thompson's Negligence, Sec. 7870.

8th Thompson's Negligence, Sec. 7870. (White Supp.) and cases cited.

Alcott vs. Public Service Cor., 32 L. R. A., (N. S.) 1084, and extended note.

As stated in the cases if the condition was different during this interim and the appliance being under the control of the plaintiff in error it could have shown that difference in condition in rebuttal.

But the real question in the case as to the turnstile is, did it stick and prevent the defendant in error and her party from going through, which is only an incident, a condition applicable to the case. The reason why it stuck was only incidental and explanatory.

ASSIGNMENT NO. 3

We have set out in our brief on our motion to

affirm, etc., the testimony of Paul Jackson in cross-examination in relation to the place where his car stopped after striking Mrs. Cothary which he stated at this trial to be two car lengths or about 90 feet. At the former trial he stated that it was three car lengths or 135 feet. He would not state whether he testified so in the former trial or not, simply said "I don't remember," but held to the two car lengths at this trial and so the court held in answer to the objection of Mr. Oakley.

> THE COURT: "While counsel would have the right to make him admit that he had testified formerly so and so if it was at all at variance or claimed to be at variance with what he testifies now, if he simply says that he did not remember it, it is substantially a denial and on the other side, does not get the benefit of his admission if he made an admission."

See Record, pages 76 to 80 inc.

We still insist that the Writ of Error sued out in this case was for delay only and that our motion to affirm and for damages should be sustained.

Respectfully submitted,

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